

UT 96-5

Tax Type: USE TAX

Issue: Use Tax Liability On Purchases (Non-Filer) 1981 Limit  
Use Tax On Out-of-State Purchase Brought Into Illinois

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS

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THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	Docket #
	)	
v.	)	IBT #
	)	
TAXPAYER	)	
	)	Karl W. Betz
	)	Administrative Law Judge
Taxpayer	)	

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RECOMMENDATION FOR DISPOSITION

APPEARANCES

Frederick Schlosser for TAXPAYER

SYNOPSIS

This cause came on to be heard following an audit performed by the Illinois Department of Revenue (hereinafter the "Department") upon TAXPAYER (hereinafter "taxpayer").

The Department performed a Retailers' Occupation and Use Tax audit upon the taxpayer for the period of July 1, 1981 through November 30, 1992. Upon completion of the audit, the taxpayer paid the liability on some transactions determined by the auditor to be taxable, and for other transactions that taxpayer contested, Notice of Tax Liability Number XXXXX was issued for \$9,804.00, inclusive of tax, penalty and interest.

Upon the filing of a timely protest by taxpayer, pre-hearing proceedings occurred and the instant hearing was scheduled and conducted. The transactions at issue originally involved some purchases taxpayer made from Missouri suppliers where taxpayer did not document it paid tax. They also included some

purchases where taxpayer did pay Missouri tax but the auditor assessed the difference between the Missouri and Illinois Use Tax rates. Concerning the latter exception category, taxpayer conceded at hearing it was liable for the difference in the Use Tax rate between the amount imposed in Illinois and the lower rate it paid to Missouri. (Tr. p. 10)

After reviewing this matter, I recommend the unresolved issues be resolved in favor of the Department.

#### **FINDINGS OF FACT**

1. Taxpayer conducted business operations in Illinois during the audit period by acting as a construction contractor who performed building and remodeling jobs for owners. (Dept. Ex. No. 2, pp. 7-10)
2. The taxpayer was not registered under the Illinois Retailers' Occupation or Use Tax Acts during the audit period and did not file Illinois sales/use tax returns. (Tr. p. 14; Dept. Ex. No. 2, pp. 7-8)
3. The taxpayer did not submit any documentary evidence in the form of books and records to show that tax was paid on the disputed transactions. (Tr. p. 3; Dept. Ex. No. 2, pp. 7-10)
4. Pursuant to statutory authority, the Department auditor did cause to be issued a Correction and/or Determination of Tax Due and this corrected return served as the basis for the Notice of Tax Liability. (Dept. Ex. Nos. 1 and 3)
5. The introduction of the Department's corrected return and NTL into evidence established its *prima facie* case. (Tr. p. 7)

#### **CONCLUSIONS OF LAW**

A tax is imposed upon the privilege of using tangible personal property within Illinois. (35 ILCS 105/2 and 3) When tangible personal property is purchased at retail, there is a presumption that tax is due unless one can document an exemption. Illinois case law has held that Use Tax is due by the

person who purchases building materials and turns them into real estate, G. S. Lyon & Sons Lumber & Mfg. Co. v. Halpin, 23 Ill.2d 180, 1961.

Because a construction contractor in Illinois incurs tax liability upon his cost price of the building materials he purchases and incorporates into real estate, I find it was proper for the auditor here to assess taxpayer on its cost price of the materials it purchased for this purpose in the absence of proof that tax was paid.

At hearing taxpayer offered three letters as its exhibits 1, 2 and 3. After an objection was made, I, as administrative law judge, did not admit these items into evidence. I made this ruling because an order I had entered in this cause on December 1, 1995 had set a December 14, 1995 deadline for submission of documentation by taxpayer. The order stated in part:

" . . Taxpayer has until December 14, 1995 to submit documentation about suppliers XXXXX and XXXXX, said documentation to be submitted to the auditors at their district office. If the documentaion is not submitted by that date, it will not be considered at the hearing."

This timetable was agreed to by taxpayer's counsel during a November 28, 1995 status conference, and this provision was intended for taxpayer's benefit and protection as it would have allowed taxpayer an opportunity to have its books and records or supplier documents reviewed prior to hearing.

Although I refused to allow the letters into evidence, they were, however, placed into the record in accordance with 86 Ill. Adm. Code, ch. I, Sec. 200.155(e), in case a reviewing authority were to desire to rule upon their admissibility. Although I did not consider these letters in making my findings and conclusions, I do note that if they had been admitted my findings and conclusions would remain the same. This is because they are unsupported statements that tax was paid and these statements were specifically prepared for hearing. They are not documentary evidence from the books of taxpayer, or its suppliers, such as invoices, sales tax returns, sales journals or other records, that show that any tax was paid, and this is the evidentiary standard that a taxpayer must meet when it challenges the correctness of an assessment before

the Department. Illinois Courts have consistently sustained a *prima facie* case based upon the corrected tax return, and once the corrected returns are admitted into evidence, there is a statutory burden placed upon the taxpayer to establish by competent documentary evidence that the adjustments performed by the Department are incorrect. Until the taxpayer provides such proof in the form of books and records, the corrected returns are presumed to be legally correct. Jefferson Ice Co. v. Johnson, 139 Ill.App. 3d 626 (First Dist. 1985); Masini v. Department of Revenue, 60 Ill.App. 3d 11, 17 (First Dist. 1978); Copilevitz v. Department of Revenue, 41 Ill.2d. 154, 1968

When counsel argues taxpayer's liability for pre-1990 jobs should be limited to the difference between Missouri and Illinois Use Tax rates because the auditor did not find purchases by taxpayer in the latter part of the audit period upon which taxpayer did not pay tax, this misstates the audit findings as the auditor did in fact find such untaxed purchases and these were the exception transactions taxpayer agreed with and paid at the close of the audit.

In summary, I find the taxpayer has not introduced competent documentary evidence in the form of books and records to overcome the *prima facie* case of the Department. Accordingly, I recommend the NTL stand as issued.

#### **RECOMMENDATION**

Based upon my findings and conclusions as stated above, I recommend the Department finalize NTL No. XXXXX and issue a Final Assessment.

Karl W. Betz  
Administrative Law Judge